

Office of Advocacy  
U.S. Small Business Administration  
409 Third St., S.W.  
Washington, D.C. 20416

August 21, 2008

**Via Electronic Filing**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

***RE: OrbitCom Petition for Forbearance of Sections 61.26(b) and  
61.26(c) of the Commission's Rules (WC Docket No. 08-162)***

Dear Ms. Dortch:

The Office of Advocacy, U.S. Small Business Administration (“Advocacy”) respectfully submits this *ex parte* filing in the above-referenced proceeding to express our concerns regarding the apparent lack of transparency surrounding the OrbitCom petition for forbearance from Sections 61.26(b) and 61.26(c) of the Commission’s rules.<sup>1</sup>

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the Small Business Administration (“SBA”), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. Part of our role under the Regulatory Flexibility Act (“RFA”) is to assist agencies in understanding how regulations may impact small businesses, and to ensure that the voice of small business is not lost within the regulatory process.<sup>2</sup> Congress crafted the RFA to ensure that, while accomplishing their intended purposes, regulations did not unduly inhibit the ability of small entities to compete,

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<sup>1</sup> See Petition of OrbitCom pursuant to 47 U.S.C. § 160 (c), Dkt. No. 08-162 (filed August 27, 2007).

<sup>2</sup> Pub. No. 96-354, 94 Stat. 1164 (1980).

innovate, or to comply with the regulation.<sup>3</sup> Advocacy believes that the Section 10 assessment in FCC forbearance proceedings is similar to the analysis required in rulemakings under the RFA.<sup>4</sup> Because the RFA and Section 10 direct the FCC to consider the economic impact of regulatory action, both statutes attempt to promote balanced and well-reasoned regulatory action.<sup>5</sup>

To make sure that agencies make well-reasoned decisions when they act, both the Section 10 forbearance process and the RFA foster good governance by providing the public with transparency in the process. In addition, both Section 10 and the RFA assist agencies in undertaking a structured analysis to explain the impacts of agency decision-making on small entities. Specifically, the Section 10 analysis addresses small business interests via the “public interest test,” which requires that the Commission consider how the grant of forbearance will impact various public interest factors.<sup>6</sup> Additionally, the “competition test” in Section 10 requires the Commission to analyze the level of competition in the market where forbearance is being requested. The RFA analysis required in agency rulemakings where there is going to be a significant impact on a substantial number of small entities also requires that agencies consider the impact of their regulations on small businesses.

OrbitCom was denied the benefits of this process when the FCC failed to make their petition public and allow interested parties to comment on the petition. OrbitCom filed its petition for forbearance on August 27, 2007. Based on the Commission’s statutory deadline of a year to either approve or deny the request for forbearance, the FCC has until August 27, 2008 to act on the petition. The Commission began circulating an order denying the forbearance request on August 6, 2008, prior to making OrbitCom’s petition available to the public on August 12, 2008. Normally, a forbearance petition is made public and posted on the FCC’s website shortly after it is filed, so that any interested parties may comment on the petition’s merits and submit industry data to either support or deny forbearance. This transparency plays a crucial role in allowing the public to take part in the process, and in ensuring that any party with helpful information may support the

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<sup>3</sup> Pub. L. 96-354, Findings and Purposes, Sec. 2 (a)(4)-(5), 126 Cong. Rec. S299 (1980).

<sup>4</sup> Pub. No. 96-354, 94 Stat. 1164 (1980); 47 U.S.C. § 160.

<sup>5</sup> 47 U.S.C. § 160 detailing in parts a and b that the Commission must determine: 1) that enforcement of the regulation is not necessary to ensure that rates and other practices are “just and reasonable;” 2) that enforcement of the regulation is not needed to protect consumers; 3) that the forbearance grant is “consistent with the public interest;” and finally stating that 4) the FCC must weigh “whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will promote competition among providers of telecommunications services.”

<sup>6</sup> 47 U.S.C. § 160 explaining that the forbearance must be consistent with the public interest.

Commission with the best available data. Because OrbitCom's petition was posted after the FCC had already made its decision and began to circulate its response, this small carrier was deprived of receiving adequate public comment on its forbearance request for the Commission to consider prior to making a formal decision. Additionally, the general public was denied the opportunity to weigh in on this important regulatory action.

Section 10 sets forth the standards for the Commission's analysis of forbearance petitions. The forbearance analysis is complicated because it requires that the FCC weigh various factors when considering a company's forbearance request.<sup>7</sup> This analysis includes an examination of whether the market in which the forbearance is sought maintains an adequate level of competition. From an industry perspective, the forbearance filing requires an understanding of how the FCC conducts its Section 10 analysis and what documentation is needed to assist the Commission in its decision-making. Unfortunately, many small businesses lack the resources and sophistication that are needed to navigate this process. Competitive local exchange carriers ("CLECs") offer competitive phone services in the U.S. market, and companies like OrbitCom provide phone service in rural and other hard to service areas. Hence, it is important that the regulatory process remain transparent, so that these carriers can fully understand how to proceed with their requests for regulatory relief. Without proper analysis under Section 10, these small carriers are presented with an unclear and burdensome process.

As a small CLEC, OrbitCom has approximately 30 employees, and it has limited resources compared to larger carriers. While OrbitCom's forbearance filing may not have included all of the required items, had the petition been made public in a timely manner, outside individuals may have been able to provide helpful comments to assist this small carrier and the Commission.

Advocacy recommends that the FCC allow OrbitCom to amend their petition, and then post the revised petition so that the public may comment. Advocacy recommends that the Commission post all forbearance petitions for public comment to foster transparency and to promote good governance. For additional information or assistance, please contact me or Cheryl Johns of my staff at (202) 205-6949 or [cheryl.johns@sba.gov](mailto:cheryl.johns@sba.gov).

Respectfully submitted,

/s/ \_\_\_\_\_

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<sup>7</sup> 47 U.S.C. § 160.

Thomas M. Sullivan  
Chief Counsel

/s/ \_\_\_\_\_  
Cheryl Johns  
Assistant Chief Counsel for

Telecommunications